No. 11840

United States Circuit Court of Appeals

For the Ninth Circuit

THE PULLMAN COMPANY, a Corporation,
Appellant,

v.

MAGGIE MAE TEUTSCHMAN,
Appellee.

Upon Appeal from the District Court of the United States for the District of Oregon.

APPELLANT'S REPLY BRIEF

M. B. Strayer,
Hart, Spencer, McCulloch & Rockwood,
1410 Yeon Building,
Portland, Oregon,
Attorneys for Appellant,

T. H. Ryan,
Ryan & Pelay,
American Bank Building,
Portland, Oregon,
Attorneys for Appellee.

SUBJECT INDEX

	PAGE
Reply to Appellee's Statement of Facts	1
Reply to Appellee's Argument	2
Argument Concerning Negligence	2
Argument Concerning Proximate Cause	10
Argument Concerning Issues at the Trial	11

AUTHORITIES CITED

	PAGE
Cox v. Jones (Or.), 138 Or. 325, 5 P. (2d) 102	6
Fowler v. Gehrke, 166 Or. 239, 111 P. (2d) 831	6
Hoffman v. Employers' Liability Assurance Corporation, 146 Or. 660, 29 P. (2d) 557	6
Kenopka v. Kenopka (Conn.), 154 A. 144, 80 A.L.R. 619	7
King v. Spencer (Conn.), 161 A. 103	6
Murphy v. Panter, 62 Or. 522, 125 P. 292	6
Nicolai-Neppach v. Smith, 145 Or. 450, 58 P. (2d) 1016	6

No. 11840

United States Circuit Court of Appeals

For the Ninth Circuit

THE PULLMAN COMPANY, a Corporation,
Appellant,

v.

MAGGIE MAE TEUTSCHMAN.
Appellee.

Upon Appeal from the District Court of the United States for the District of Oregon.

APPELLANT'S REPLY BRIEF

REPLY TO APPELLEE'S STATEMENT OF FACTS

Appellee's brief goes outside the record to bring in many asserted facts which are not properly before the court. There was no evidence that appellee was confused, tired or excited. On the contrary, her testimony was that she "felt wonderful" (R. p. 99). There was no

evidence that appellee was habitually eccentric, or that she was uneducated or ignorant (except on the subject of traveling on sleeping cars); or that she had any "peculiarities of habit" as alleged on page 10 of appellee's brief. There was no evidence that appellee's age, which was 61 at the time of the accident (R. p. 48), in any way handicapped her. There was no evidence that she was poor or unable to support herself, and these assertions, if true, are not relevant to the issues before the court.

REPLY TO APPELLEE'S ARGUMENT

1. We believe appellee's principal arguments may be summarized as follows:

(a) Appellee was old and inexperienced in travel on sleeping cars.

(b) Her actions at the trial revealed that she is eccentric (although there is nothing in the record to bear out this contention) which justified the trial court in finding that she was "confused" at the time of the accident.

(c) Appellant was therefore required to fasten the inside buttons on the curtains of her berth, or instruct her to do so.

(d) Its failure in this regard was the proximate cause of her falling from her berth.

The question is whether these factors were sufficient to require the particular precaution which appellee contends should have been taken, namely, fastening the inside buttons on the curtains. In determining this question it is not proper to ignore, as appellee would do, the fact that fastening the buttons was an unnecessary precaution against an inadvertent fall. The uncontroverted evidence establishes the fact that with the curtains closed it was impossible to fall from the berth. When this fact is recognized it is apparent that such factors as appellee's age, her lameness and her inexperience in travel on sleeping cars could not possibly indicate to appellant the necessity of fastening the inside buttons. Appellee's insistence in dwelling upon such matters merely serves to cloud the real issue, which is whether the other factors mentioned were sufficient to put appellant on notice that appellee was so irresponsible that fastening the buttons was necessary, not to prevent an inadvertent fall, but to restrain appellee physically from the irresponsible or willful act of leaving her berth.

Undoubtedly the trial court is in a more favorable position than an appellate court to judge the credibility of witnesses. But this appeal does not involve a question of credibility. The issue is whether there was any substantial evidence to sustain the findings of the court.

Before the court could find that appellant owed a duty of extraordinary care it was required to find, based upon substantial evidence, that appellee was in such abnormal condition, within appellant's knowledge, as to require such special care. The condition to be determined was not that on the date of trial, but appellee's condition on the date of the accident.

If, as appellee asserts, the trial court was influenced in its decision by appellee's conduct and appearance at the trial (and there is no evidence that such conduct or appearance was unusual or that the court was so influenced), such conduct and appearance 20 months after the accident could not supply the necessity of substantial evidence of her condition at the time of the accident.

Eliminating all of the material supplied by appellee from outside the record, the only evidence of an unusual condition of appellee was (1) her age, (2) her crippled condition, (3) her inexperience in traveling on sleeping cars, (4) a superficial appearance of intoxication, and (5) evidence that she was taking some kind of medicine.

In appellant's opening brief the contention was made that appellee is bound by her testimony that she was in

perfect health before the accident. A large portion of appellee's brief is devoted to argument upon this question. We think counsel for appellee have overlooked the essential point of distinction which we attempted to make clear in our opening brief.

The great weight of authority supports the general proposition that a party is bound by his own testimony and, in order to win a favorable verdict, will not be permitted to assert that his testimony was false. But this does not mean that he may not, in proper circumstances, correct or retract testimony in which he was honestly mistaken. Thus the test whether he will be allowed to repudiate his testimony is whether such course is consistent with honesty and good faith. If his testimony relates to facts peculiarly within his own knowledge and as to which he cannot be mistaken, it is not consistent with honesty and good faith to permit him to repudiate his story. But if his testimony is in the nature of an estimate or opinion as to which he may honestly be mistaken; or if other circumstances are present, such as confusion or misunderstanding, there is no injustice in permitting the court to consider other evidence in the case and determine from all the evidence what the actual facts are.

In *King v. Spencer* (Conn.), 161 A. 103, these distinctions are pointed out with clarity and the case of *Cox v. Jones* (Ore.), 138 Or. 325, 5 P. (2d) 102, relied upon by appellee, is cited as a case falling within the exception relieving a party from an honest mistake.

The case of *Cox v. Jones,* supra, involved an automobile accident wherein the plaintiff admitted that she saw defendant's car approaching at a given estimated speed and about half a block from the intersection. There was other evidence of a contradictory nature. The Oregon court held that in the light of other portions of the record such testimony was not conclusive upon the plaintiff. It is obvious that this case was properly classified by the Connecticut court in *King v. Spencer,* et al, supra, as one involving testimony in the nature of an estimate or opinion as to which the plaintiff might well have been mistaken. There is no indication in this case that the Oregon court intended to repudiate the general rule long followed in this jurisdiction that a party to an action is bound by his testimony. *Murphy v. Panter,* 62 Or. 522, 125 P. 292; *Hoffman v. Employers' Liability Assurance Corporation,* 146 Or. 660, 29 P. (2d) 557; *Nicolai-Neppach v. Smith,* 145 Or. 450, 58 P. (2d) 1016; *Fowler v. Gehrke,* 166 Or. 239, 111 P. (2d) 831.

Appellee urges that the rule is not applicable where a party was not in full possession of his faculties at the time of the occurrence and at the time of the trial. It seems obvious that where these conditions are present it is not inconsistent with honesty and good faith to permit a party to retract his testimony and correct an honest mistake brought about by an abnormal condition. Such was the situation in *Kenopka v. Kenopka* (Conn.), 154 A. 144, 80 A. L. R. 619. However, in the case at bar no such situation prevailed. The fact whether appellee was in good health immediately prior to the accident or whether she was abnormal from any cause was one peculiarly within her knowledge. We are not concerned at this point with whether she was abnormal at the very instant of the accident, but whether at the time of trial she knew the condition of her health immediately prior to the accident. She knew definitely whether she had or had not been taking medicine, and whether she was ill in any degree. In these circumstances, it is not consistent with honesty and good faith for appellee now to repudiate her sworn testimony and urge that she had been taking medicine or that she was not in normal health.

We agree with counsel for appellee that it is not of controlling importance whether appellee had taken

some nembutal. If she did not take this medicine, however, and if she was in good health as she alleges, appellee's theory that she was so "crippled and confused" as to need care amounting to physical restraint is deprived of its last vestige of support. While appellee's age and inexperience in traveling might have been sufficient to require such additional assistance as closing the curtains to prevent an inadvertent fall, there was nothing about her age and inexperience to indicate a requirement of physical restraint.

As we have pointed out in our opening brief, the trial court's findings established that the curtains were fastened to rods at the top and bottom of the berth; and its failure to make a finding concerning the position of the curtains requires acceptance of the testimony that they were closed. The undisputed testimony is that in these circumstances appellee could not have fallen from her berth. It necessarily follows from this that she must have spread the curtains and placed herself in a position where it was possible for her to fall through the small opening. The trial court refrained from finding whether she accidentally fell from the berth in the manner claimed or whether she fell while attempting to get out of the berth. Liability was predicated on the asserted duty to prevent her either from *falling out or getting out* of the berth.

If appellee adheres to the theory that she inadvertently fell in the manner claimed, she is confronted with uncontroverted testimony that with the curtains closed it would have been impossible for her to have so fallen. It is no answer to this to say that she was elderly and inexperienced and should have been warned of the danger because the physical facts establish that there was no danger of an inadvertent fall. If appellee pursues the trial court's reasoning that fastening the buttons on the curtains would have prevented her from getting out of the berth, she is confronted with the fact that there was no substantial evidence of a condition of appellee which would put appellant on notice that physical restraint was necessary. Certainly her age and inexperience and such eccentricity as appellee seeks to infer indicate no necessity for such measures. Neither could appellee's superficial appearance of intoxication, and her taking of medicine possibly indicate to appellant's employees the need for physical restraint.

Appellee's attempt to distinguish the cases cited by appellant on the ground that intoxicated persons do not ask for help overlooks the essential point of inquiry, which is whether the conditions apparent to or conveyed to appellant's employees were such as to notify them that appellee was *helpless* and *irresponsible*. Her state-

ments that she had never before traveled in a sleeping car and her protests against riding in an upper berth could not conceivably serve as notice to appellant's employees that unless she were physically restrained she would attempt to leave the berth. Instead of indicating that she was irresponsible, these protests indicated an acute awareness of the danger of falling from an upper berth unless appropriate measures were taken for her safety. The measures which were taken, namely, the closing of the curtains, were appropriate and adequate to guard against an inadvertent fall which might be anticipated because of appellee's age and inexperience.

2. Appellee has failed to make any adequate answer to appellant's argument concerning proximate cause. Appellee's assertion that the reason for fastening the inside buttons on the curtains is to prevent "the imminent danger of being thrown out of the berth" is not supported by any evidence in the record. Indeed, the evidence establishes beyond dispute that with the curtains closed, even though unbuttoned, it is impossible for a passenger to fall or be thrown from his berth.

If, as appellee argues, the trial court believed that the movement of the train had caused appellee to fall from the berth, it is strange that the court did not so find. The court's finding that fastening the buttons would

have prevented appellee either from getting out or falling out of the berth demonstrates conclusively that the court felt it unnecessary to determine whether or not the appellee had attempted to leave the berth. This was clearly error since the fastening of the buttons would not have been effectual to restrain appellee from attempting to leave her berth.

Appellee argues that if she did attempt to leave her berth, the failure of appellant to warn and instruct her as to the use of the upper berth would render it liable. It should be sufficient answer to point out that there was no issue and no finding by the court of a failure to warn appellee of the danger in leaving the berth or that there was a duty to so warn her. The reason for the lack of such finding is obvious. There is no duty to warn a person of an obvious danger.

3. In answer to appellant's argument that the trial court was without authority to find liability based upon an asserted obligation to prevent appellee from getting out of her berth, appellee argues that the complaint and pre-trial order put in issue the fact of appellee's age and inexperience. This is not denied. But there was no issue that she was so abnormal as to require physical restraint as a precaution against irresponsible or willful acts. There is a wide gap between an issue of age and inex-

perience requiring instructions and precautions against inadvertent injury, and an issue of a condition requiring protective measures against intentional or irresponsible acts. The latter contention was not made at the trial and is asserted by appellee for the first time on this appeal. Under any concept of justice and fair play appellant should have been given notice that there was such a contention and afforded an opportunity to meet the issue with evidence.

While we have not replied in detail to every argument made in appellee's brief, we believe those matters which we have not commented upon are adequately covered in appellant's opening brief.

It is therefore respectfully submitted that the judgment should be reversed.

M. B. Strayer,
Hart, Spencer, McCulloch & Rockwood,
Attorneys for Appellant.
1410 Yeon Building,
Portland 4, Oregon.